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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF OHIO,

Petitioner,

-vs-

JEFFREY CARPENTER,

Respondent.

On Petition for A Writ of Certiorari
To the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court acting under the Due Process Clause of the Fourteenth Amendment will enforce a plea bargain according to the promises in fact made by the prosecutor or according to terms implied by the court as a matter of law.

2. Whether a court can specifically enforce a plea bargain against a prosecutor under the Due Process Clause when the defendant has failed to prove by a preponderance of the evidence that the prosecutor breached the bargain.

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 68 Ohio St.3d 59, 623 N.E.2d 66. No other opinion of a lower court is reported officially or unofficially. However, the opinion of the Tenth District Court of Appeals and the decision of the Franklin County Common Pleas Court are both a part of the appendix to

this petition.

JURISDICTIONAL STATEMENT

Petitioner, the State of Ohio, seeks review of a judgment of the Ohio Supreme Court dated and filed December 22, 1993. The State of Ohio timely sought rehearing, but the Ohio Supreme Court denied rehearing in an entry dated and filed on February 2, 1994. The court filed its mandate on the same date. In an entry filed March 3, 1994, the Ohio Supreme Court granted a motion to stay its mandate pending review by this Court.

Section 1257 of Title 28 of the United States Code confers jurisdiction on this Court to review the judgment of the Ohio Supreme Court by writ of certiorari. Respondent Carpenter claimed, and the Ohio Supreme Court recognized, a right under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In particular,

the Ohio Supreme Court cited and quoted ***Santobello*** v. ***New York***, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), a decision in which this Court set forth Due Process principles that apply in the plea bargaining context. The Ohio Supreme Court did not refer to any state-law ground for its decision, and the court made no plain statement that it was relying on state law. See ***Michigan*** v. ***Long***, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution is involved in this case. It states, as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

United States Constitution, Amendment XIV, Section 1.

STATEMENT OF THE CASE

On October 23, 1984, the Franklin County Grand Jury indicted respondent Jeffrey Carpenter on one count of felonious assault in Common Pleas Case No. 84CR-09-2646. The indictment charged that Carpenter knowingly caused serious physical harm to victim Mark Walden and/or caused or attempted to cause physical harm to Walden by means of a deadly weapon, a knife. The indictment alleged that the offense took place on September 6, 1984.

On January 14, 1985, the Franklin County Common Pleas Court conducted a plea hearing. At the outset of the hearing, Assistant Prosecutor Scott VanDerKarr stated that Carpenter would be pleading guilty to attempted felonious assault, a stipulated lesser included offense. (Hrg., 1-14-85, at 2) VanDerKarr further explained that the State had agreed not to oppose a defense request for a prison sentence of two-to-ten

years. (Hrg., 1-14-85, at 2) VanDerKarr proffered to the court an "entry of guilty plea" form. Both Carpenter and his attorney, Roger Warner, approved the form. (Hrg., 1-14-85, at 3)

After the court engaged in a colloquy with Carpenter, prosecutor VanDerKarr stated the factual basis for the guilty plea. VanDerKarr explained that Carpenter had stabbed and kicked victim Walden during a confrontation over a girlfriend. (Hrg., 1-14-85, at 7) Carpenter admitted this allegation. (Hrg., 1-14-85, at 8) VanDerKarr further explained (in Carpenter's presence) that Walden was "in a coma in the hospital, [and was] probably expected not to come out of that coma." (Hrg., 1-14-85, at 8)

After engaging Carpenter in a further colloquy, the court accepted his guilty plea and proceeded with sentencing. In the course

of discussing sentencing, Assistant Prosecutor VanDerKarr said he was recommending a two-to-ten year sentence. (Hrg., 1-14-85, at 10) Defense counsel Warner then asked the court to impose the recommended two-to-ten year sentence because "the two to ten recommendation is the basis of the bargain in this case." (Hrg., 1-14-85, at 10) The court concluded the hearing by imposing a two-to-ten year sentence as recommended by the parties. (Hrg., 1-14-85, at 11) The judgment of conviction was entered on January 17, 1985, and the following day defendant was conveyed to prison.

On March 28, 1986, fourteen months later, Mark Walden died because of the injuries Carpenter had inflicted. The coroner signed a report stating that conclusion on May 1, 1986. Twenty months later, on January 28, 1988, the grand jury indicted Carpenter for the murder

of Mark Walden under Common Pleas Case No. 88CR-01-286.

Carpenter thereafter filed a series of motions to dismiss. In the first motion to dismiss, Carpenter claimed that the murder indictment violated his double jeopardy rights. (Hrg., 8-15-88, at 1-15) The common pleas court granted this motion, but the Tenth District Court of Appeals reversed, concluding that double jeopardy principles allowed a second prosecution because the victim had not died until after jeopardy had attached in the first prosecution. The Ohio Supreme Court declined to take jurisdiction on the double jeopardy issue. ***State*** v. ***Carpenter***, 44 Ohio St.3d 709, 542 N.E.2d 347 (1989).

Upon remand, the defense filed a second motion to dismiss. The defense claimed that prejudicial pre-indictment delay warranted dismissal. (Hrg., 11-13-89, at 1-14) The

common pleas court again dismissed the indictment, and the court of appeals again reversed, finding that Carpenter had demonstrated no prejudice warranting dismissal. The Ohio Supreme Court again declined jurisdiction. ***State*** v. ***Carpenter*** (1990), 55 Ohio St.3d 707, 563 N.E.2d 297 (1990).

Upon further remand, the defense filed a third motion to dismiss. In this third motion, Carpenter contended that the 1985 plea bargain barred further prosecution on the murder indictment. Carpenter quoted ***Santobello*** v. ***New York***, 404 U.S. 757, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), for the proposition that criminal defendants are entitled to "what is reasonably due in the circumstances" and that promises by the prosecutor must be fulfilled. (See Motion to Dismiss, filed 12-5-90, at 1-2) Carpenter

further referred to his Due Process rights when he stated, as follows:

> Thus the values that underlie contract law may be used to enforce plea agreements in addition to the added rights guaranteed by the Due Process Clause that presupposes fairness in the conduct of the government and that a constant factor of such fairness is that the promise of the prosecutor must be fulfilled. Santobello v. New York, supra.

(See Motion to Dismiss, at 3)

On February 12, 1991, the Franklin County Common Pleas Court conducted a hearing on the third motion to dismiss. At that hearing, the court considered the transcript of the original guilty plea hearing, held on January 14, 1985, as well as the testimony of Assistant Prosecutor VanDerKarr, who had represented the State at the guilty plea hearing. (Hrg., 2-12-91, at 1-15) Respondent Carpenter did not testify on his own behalf, nor did he call his original attorney, Roger

Warner, to testify.

At the hearing, Carpenter's counsel orally reiterated the arguments made in the motion to dismiss. Counsel also re-introduced certain exhibits from previous hearings.

Assistant Prosecutor VanDerKarr raised Question No. 1 when he testified that the parties reached no agreement in 1985 regarding the possibility of a future homicide charge. Specifically, VanDerKarr testified, as follows:

> [W]e came to court on the 14th of January, 1985, and stood about 10 to 15 feet outside . . . [the] courtroom.
>
> . . .
>
> Roger Warner walked up to me and said, Are you going to indict on further charges if the victim dies?
>
> I said, that is a decision that I cannot make. In essence, I was saying at that time I was a peon in the prosecutor's office.
>
> I told him that people higher in the office would have to make that decision if the person died, the victim died, as to whether we would prosecute or not for a murder, aggravated murder, whatever was appropriate.

(Hrg., 2-12-91, at 11-12)

Question No. 2, the burden of proof issue, did not arise during the hearing, since Carpenter's counsel apparently assumed that burden by proceeding first with the evidence. Nevertheless, Assistant Prosecutor VanDerKarr indirectly raised that question when he testified. VanDerKarr testified that it could not be assumed that Carpenter was ignorant of the possibility of future charges. (Hrg., 2-12-91, at 13-14) VanDerKarr testified that "[i]t would be the duty of defense counsel, having that discussion with me, to pass that along to his client." (Hrg., 2-12-91, at 14)

Despite VanDerKarr's testimony and despite the lack of testimony from the defense, the common pleas court granted the third motion to dismiss. In an oral ruling from the bench, the court stated, as follows:

> I am going to sustain the motion to dismiss, and I will give you my

> reasons why. I think that had the defendant gone to trial on this case on the not guilty plea and was found guilty and then subsequently the victim died, a charge of murder might very well have been correct. But, it is my feeling that when you sit down, as the prosecutors and defense lawyers do, and they reach an agreement, look, I will plead to this and that is agreed to, that to me is like a contract and it should stand.
>
> I am also concerned about the fact that there was such an unreasonable delay in the filing of this murder charge after the death of the victim in this case. Those are my reasons. If the prosecutor wants to take it to the court of appeals again, he may. (Hrg., 2-12-91, at 14-15)

On September 13, 1991, the court filed a "decision and judgment entry of dismissal." In this written entry, the court repeated Carpenter's argument that "the promise of the prosecutor must be fulfilled" under ***Santobello***. The court also recognized that the parties had not inserted any term barring a future murder charge into the plea bargain.

The court stated, as follows:

> **Had a provision been inserted into the plea agreement indicating that the defendant would not be further prosecuted even if the alleged victim subsequently died, it would be clear that the state could not thereafter violate its promise and prosecute the defendant.** Likewise, if the state had expressly reserved the right to further prosecute the defendant if the alleged victim died, the agreement itself would not constitute a bar to further prosecution.
>
> **In the instant situation, however, the prior plea form does not address the issue at all.** . . . Under such circumstances, the law has held that the state, unless it has specifically reserved the right to further prosecute the defendant, is bound by its promises made to the defendant.

(Decision, at 5)(emphasis added)(Appendix)

Despite the silence of the plea agreement, the common pleas court ruled that the State was barred from prosecuting Carpenter for murder. The court stated, "If the state wants to reserve the power to void or vacate its agreement based upon the

contingency of the death of the alleged victim, it must make such a contingency part of the agreement in the same fashion that civil litigants must make such reservations." (***Id***. at 8) By failing to reserve the right to prosecute defendant for murder, the court ruled, the State had forfeited that right. (***Id***. at 5)

In the second part of the entry, the common pleas court determined that the State had waived the right to prosecute by failing to seek a timely rescission of the 1985 plea agreement. According to the trial court, the State had "ratified" the plea bargain by waiting twenty-two months after Mark Walden's death before indicting Carpenter for murder. (***Id***. at 10) The court ruled, "The state cannot sit back, take full advantage of its 'bargain', and then later be heard to say that it does not wish to be bound thereby." (***Id***.)

The State of Ohio thereafter appealed to the Tenth District Court of Appeals, raising the questions now raised in this petition. The State raised Question No. 2, the burden of proof issue, as follows:

> Appellee [Carpenter] argued below that the agreement entered into by the state and the defendant which disposed of the then pending felonious assault charge, also disposed of any potential homicide charge should the victim later expire. There is absolutely no evidence to support that claim.
>
> One who seeks to enforce an alleged plea agreement bears the buren (***sic***) of proving the terms thereof. ***State*** v. ***Thrower*** (1989), 62 Ohio App. 3d 359, 376. Appellee offered no proof that his plea to attempted felonious assault embraced an agreement that no homicide charges would be pursued if his victim later died. ... Had there been one iota of substance to appellee's current assertion, appellee would have presented the testimony of his trial attorney and would have testified himself.

(See State's Merit Brief on Appeal, filed 12-12-91, at 5-6) The State raised Question No.

1, the "promise-in-fact" issue, when it argued, as follows:

> For there to be a plea agreement, the parties must in fact agree to its terms. In the context of plea agreements, the Supreme court has held that it is error for a court "to imply as a matter of law a term which the parties themselves did not agree on." ***United States*** v. ***Benchimol*** (1985), 471 U.S. 453, 456, 105 S.Ct. 2103, 2105. Rather than create an agreement from whole cloth, a court should enforce a plea agreement " . . . according to its tenor, unfestooned with covenants the parties did not see fit to mention." ***United States*** v. ***Anderson*** (1st Cir. 1990), 921 F. 2d 335, 338.
>
> Simply stated, there is no evidence of agreement that appellee would escape prosecution if the victim eventually died. To the contrary, the only evidence before the trial court makes clear that no such agreement existed. Moreover, the trial court could not properly read into appellee's plea, agreements that did not exist. See Criminal Rule 11(F).

(See State's Merit Brief on Appeal, at 6-7) The State reiterated these arguments in its reply brief. (See State's Reply Brief on

Appeal, filed 1-21-92, at 3, 5)

The Tenth District Court of Appeals agreed with the arguments now raised by the State of Ohio. The court of appeals noted that the defense had failed to meet its burden of proof in the trial court. The court of appeals stated, as follows:

> As is the case in the law of contracts, the party seeking to enforce a plea agreement bears the burden of proving its existence. ***State*** v. ***Thrower*** (1989), 62 Ohio App. 3d 359, 376. In this case, there is no dispute as to the terms of the plea agreement by which defendant pled guilty to attempted felonious assault. **It simply did not address whether or not the state could file additional charges in the event of the victim's death**. As defendant presented no evidence other than the terms of the plea agreement, he has failed to meet his burden of proving that the state agreed to a limitation on its right to file additional charges.

State v. ***Carpenter*** (April 30, 1992), Tenth Dist. App. No. 91AP-1150, unreported, Opinion at 3-4 (Appendix) (emphasis added).

The court of appeals also rejected the proposition that the State should have reserved its right to prosecute defendant. The appellate court instead followed ***Benchimol*** and concluded that a court "should not supply [a] missing term where the parties have not done so. . . . When a plea agreement does not address [a] given contingency, the court should generally presume that it was the parties' intent that they would retain whatever rights they had prior to the agreement." (Opinion, at 5-6)

The court of appeals likewise rejected the common pleas court's "waiver" argument. Since the 1985 plea bargain did not preclude a future murder charge, the State had "no cause to rescind" it. (Opinion, at 6) The court of appeals reversed and remanded the case to the common pleas court with instructions to reinstate the indictment and set the case for

trial. (Id. at 7)

Carpenter appealed to the Ohio Supreme Court and again raised a Due Process claim. Carpenter stated, as follows:

> Thus the Supreme Court [in ***Santobello***] elevated plea agreements made by state prosecutors to the level of constitutional obligations owed to the defendant. When such agreements go unfulfilled, constitutional rights of the accused are infringed.
>
> In addition to the application of due process considerations, courts also resort to traditional contract principles and view plea agreements as contracts. As stated in ***United States*** v. ***Ataya*** (7th Cir. 1988), 864 F.2d 1324 at 1329:
>
> > This Court has long recognized that a plea agreement is a contract, ... but a contract in which special due process concerns for fairness and the adequacy of procedural safeguards obtain . . ..

(See Carpenter's Merit Brief in Ohio Supreme Court, filed 12-21-92, at 8-9)(citations in

Ataya omitted)

The State of Ohio responded by reiterating its argument (Question No. 1) that no promise in fact had been made. Under the rules of the Ohio Supreme Court, the State was required to set forth "propositions of law" that could serve as the binding syllabus of the court's decision. In the State's first proposition of law, the State set forth the following:

> 1. IN A CRIMINAL CASE, THE PARTIES ARE BOUND ONLY BY THE PLEA AGREEMENT THEY ACTUALLY MAKE. A COURT MAY INTERPRET THAT AGREEMENT TO GIVE EFFECT TO THE PARTIES' INTENT, BUT THE COURT CANNOT IMPLY TERMS INTO THE AGREEMENT AS A MATTER OF LAW. (***United States*** v. ***Benchimol*** (1985), 471 U.S. 453, followed)

(See State's Merit Brief in Ohio Supreme Court, filed 1-21-93, at 7) The State thereafter quoted extensively from ***Benchimol*** and its holding that courts should not "imply as a matter of law a term which the parties

themselves did not agree upon." (See State's Merit Brief in Ohio Supreme Court, at 8-9)

At pages thirteen and fourteen of the brief, the State again reiterated Question No. 1, i.e., that no promise in fact had been made. In the following passage, the State relied heavily on the holding in ***Santobello***:

> Defendant relies on two cases from other states in arguing that the 1985 plea agreement contained a "no murder charge" term. In ***State*** v. ***Thomas*** (1972), 61 N.J. 314, 294 A. 2d 57, and ***State*** v. ***Nelson*** (1990), 23 Conn. App. 215, 579 A. 2d 1104, appeal denied (1990), 216 Conn. 826, 582 A. 2d 205, cert. denied (1991), 111 S.Ct. 1315, the courts found a subsequent homicide prosecution to be barred by a plea agreement. These courts honored what they perceived to be the "reasonable expectations" or "reasonable beliefs" of the defendants about their plea agreements. ***Thomas***, *supra*, at 321, 294 A. 2d at 61; ***Nelson***, *supra*, at 219, 579 A. 2d at 1106. In honoring mere expectations and beliefs, however, these courts ignored the limits set forth in ***Santobello*** v. ***New York*** (1971), 404 U.S. 495.
>
> In ***Santobello***, a prosecutor had

promised as part of a plea agreement to make no recommendation as to the defendant's sentence. At the sentencing hearing, however, another prosecutor from the same office recommended the maximum sentence. Based on this breach, the United States Supreme Court reversed the defendant's conviction. The Court held, as follows: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

Under this holding, a defendant must show three elements to succeed on a claim of a broken plea agreement. First, he must show the existence of a promise or agreement. Second, he must show that the prosecutor made the alleged promise or agreement. Third, he must show that the prosecutorial promise or agreement served as the "inducement or consideration" for his guilty plea. See ***Mabry*** v. ***Johnson*** (1984), 467 U.S. 504, 509-510.

The holdings in ***Thomas*** and ***Nelson*** are flawed under the first two of these elements. The ***Thomas*** and ***Nelson*** courts said they were honoring the defendants' reasonable expectations about their plea agreements, but they failed to recognize that the expectations of a defendant are not "reasonable"

> unless they are grounded in the terms of the plea bargain. As stated in ***United States*** v. ***Crusco*** (C.A. 3, 1976), 536 F. 2d 21, 24, "cases of disappointed but unfounded expectations must be carefully distinguished from those in which the defendant's expectations . . . are predicated upon promises by the Government . . .." The defendant's expectations must be based on a "commitment from the . . . prosecutor . . .." ***United States*** v. ***James*** (C.A. 7, 1976), 532 F. 2d 1161, 1162-63, cert. denied (1976), 429 U.S. 840; ***State*** v. ***Mathews*** (1982), 8 Ohio App. 3d 145. ***Santobello*** has no application when the defendant's expectations are based solely on promises from someone other than the prosecutor. See ***Paradiso*** v. ***United States*** (C.A. 3, 1973), 482 F. 2d 409, 411, 412.

(See State's Merit Brief in Ohio Supreme Court, at 13-14)

The State also raised Question No. 2 regarding Carpenter's failure to meet his burden of proof. The State argued, as follows:

> Defendant's reliance on ***Thomas*** and ***Nelson*** is misplaced in any event. Defendant has never testified regarding his expectations

> at the time of the 1985 plea agreement. Defendant's original trial counsel likewise has never testified on that subject. On the other hand, the prosecutor did testify. He said that he expressly refused to make a "no murder charge" promise to defendant's counsel. Given the presumption that defendant's counsel was competent, counsel no doubt told defendant about the prosecutor's refusal. See ***State*** v. ***Smith*** (1985), 17 Ohio St. 3d 98, 100. On this record, defendant has failed to show that he expected not to be prosecuted for murder. Even if ***Thomas*** and ***Nelson*** are valid precedents, defendant has failed to meet his burden of proving that the State breached the 1985 plea agreement.

(See State's Merit Brief in Ohio Supreme Court, at 15-16)

The Ohio Supreme Court inexplicably reversed in a five-to-two decision. ***State*** v. ***Carpenter*** (1993), 68 Ohio St. 3d 59, 623 N.E.2d 66. Like the lower courts, the Ohio Supreme Court noted that the 1985 plea bargain was silent. The court stated that "[t]he plea agreement contained no reference to additional

prosecution in the event of the alleged victim's death." *Id.* at 60, 623 N.E.2d at 67. This statement was consistent with the concession made by respondent Carpenter in his merit brief, in which he conceded that "the entire agreement was silent with respect to [the] contingency" of the victim's death. (See Carpenter's Merit Brief in Ohio Supreme Court, at 6)

Despite this concession and despite the observation that the plea bargain was silent, the Ohio Supreme Court adopted the reasoning of the common pleas court and held that the indictment was barred. The Ohio Supreme Court determined that, "if the state wanted to reserve its right to bring further charges later, should the victim die, the state should have made such a reservation a part of the record." *Id.* at 62, 623 N.E.2d at 68. In its binding syllabus language, the Court ruled, as

follows:

> The state cannot indict a defendant for murder after the court has accepted a negotiated guilty plea to a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea.

The Ohio Supreme Court purported to base its decision on ***Santobello***. However, the court did not address the State's argument under ***Santobello*** and ***Benchimol*** that no promise in fact had been made barring further prosecution. Likewise, the court did not address the State's argument that Carpenter failed to meet his burden of proof.

The State of Ohio now asks that this Court grant a writ of certiorari so that it may review the erroneous decision of the Ohio Supreme Court.

ARGUMENT

QUESTION NUMBER ONE

Under the Due Process Clause of the Fourteenth Amendment, a court will enforce a plea bargain only according to promises in fact made by the prosecutor. A court will not imply a missing term as a matter of law and then enforce that term against the prosecutor.

The State of Ohio urges this Court to allow a writ of certiorari. The Ohio Supreme Court purported to base its decision on ***Santobello*** v. ***New York***, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and on decisions from the New Jersey Supreme Court, the New Hampshire Supreme Court, and the Connecticut Court of Appeals. However, the Ohio Supreme Court failed to recognize the limits of this Court's holding in ***Santobello***, as did the other courts it cited in support of its holding. The State of Ohio urges this

Court to grant certiorari so that it may give guidance to lower courts and thereby set straight the growing list of courts that have misapplied ***Santobello***.

In January 1985, the prosecutor and Carpenter reached a plea bargain. The prosecutor agreed to allow Carpenter to plead guilty to the "stipulated" or amended charge of attempted felonious assault. The prosecutor agreed to recommend an indeterminate sentence of two to ten years in prison. During negotiations, Carpenter's attorney asked whether Carpenter would be indicted on further charges if the victim later died. The prosecutor told Carpenter's attorney that he (the prosecutor) could not agree to any term barring future charges. The prosecutor said that persons higher in the prosecutor's office would make the decision to prosecute Carpenter if and when the victim

died. Despite the prosecutor's refusal to bargain over the possibility of a future homicide charge, Carpenter nevertheless proceeded to plead guilty to attempted felonious assault.

All Ohio courts have agreed that the 1985 plea bargain was silent regarding the possibility of a future murder charge. The common pleas court noted that the parties had not inserted any provision barring future prosecution into the plea bargain. The court of appeals stated that the plea bargain "simply did not address whether or not the state could file additional charges in the event of the victim's death." The Ohio Supreme Court stated that the 1985 plea bargain "contained no reference to additional prosecution in the event of the alleged victim's death." This statement was consistent with Carpenter's concession in the

Ohio Supreme Court that "the entire agreement was silent with respect to this contingency [of death]."

Given the utter silence of the 1985 plea bargain, this Court's holding in ***Santobello*** should have disposed of Carpenter's claim that the plea bargain barred his prosecution for murder. In ***Santobello***, this Court set forth certain standards that would govern the future enforcement of plea bargains. This Court stated that a criminal defendant is entitled to the benefits that are "reasonably due" him under the circumstances. This Court then set forth the pertinent rule of law:

> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433. Therefore, under ***Santobello***, a criminal defendant must show three elements before he

can succeed on a claim that the prosecutor has breached a plea bargain. First, the defendant must show that a promise was made. Second, the defendant must show that the prosecutor made the promise. Third, the defendant must show that the promise served as the consideration or inducement for his guilty or no contest plea. See ***Mabry*** v. ***Johnson***, 467 U.S. 504, 509-510, 104 S.Ct. 2543, 2547-48, 81 L.Ed.2d 437, 444-45 (1984). If the defendant proves these three elements, then the prosecutor's promise must be fulfilled as a matter of due process.

Although the Ohio Supreme Court purported to base its decision on ***Santobello***, the court failed to follow ***Santobello***. The Ohio Supreme Court dismissed the murder indictment because of Carpenter's alleged expectation that his guilty plea precluded future prosecution and because of the prosecutor's alleged awareness

of that expectation. Essentially, the Ohio Supreme Court held that the prosecutor should have expressly reserved the right to prosecute Carpenter so that Carpenter's "expectation" could be dispelled.

In honoring Carpenter's alleged expectations, the Ohio Supreme Court forgot that ***Santobello*** focuses on the promises actually made by the prosecutor, not on the defendant's expectations. ***Santobello*** "recognize[d] . . . the requirement that a prosecutor's plea-bargaining ***promise*** must be kept . . . ." ***Bordenkircher*** v. ***Hayes***, 434 U.S. 357, 362, 98 S.Ct. 663, 667, 54 L.Ed.2d 604, 610 (emphasis added). Although some courts continue to overlook this principle, see, e.g., ***United States*** v. ***Guevara***, 941 F.2d 1299, reh'g denied, 949 F.2d 706 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1603, 118 L.Ed.2d 316 (1992), a number of courts

have recognized that a prosecutor is bound only by the promises he in fact made. ***United States*** v. ***Anderson***, 921 F.2d 335, 337 (1st Cir. 1990); ***United States*** v. ***Fentress***, 792 F.2d 461, 464 (4th Cir. 1986); ***United States*** v. ***Miller***, 900 F.2d 919, 921 (6th Cir. 1990); ***United States*** v. ***Jordan***, 870 F.2d 1310, 1316 (7th Cir. 1989), cert. denied, 493 U.S. 831, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989); ***Baughman*** v. ***State***, 430 S.E.2d 505, 506-507 (S.C. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 549, 126 L.Ed.2d 450 (1993).

In light of this "promises actually made" requirement, the Ohio Supreme Court should have rejected Carpenter's broken plea bargain claim. The 1985 plea bargain was silent on the issue of additional charges. This silence means that the plea bargain contained no promise barring a future murder charge. There was no promise to be enforced, and therefore

there was no basis under ***Santobello'*** to dismiss the murder indictment.

Carpenter was not left without a remedy. If he pled guilty in 1985 under the mistaken impression that his guilty plea ended his liability for the stabbing, then his guilty plea might be deemed involuntary, unknowing, or unintelligent. His remedy in that event was to seek to withdraw his guilty plea. As one treatise has stated:

> If such a claim [of mistaken belief] is made out, it must be remembered that this is not a broken bargain under the ***Santobello*** case and that consequently the defendant is not entitled to demand specific performance of a promise which in fact was never made; the remedy is withdrawal of the plea.

2 LaFave & Israel, *Criminal Procedure*, Section 20.2(f), at 608 (1986) (footnote omitted). Of course, the remedy of withdrawal would have provided small solace to Carpenter, since he had already served some time on his attempted

felonious assault conviction. Nevertheless, it was the only remedy available. Carpenter was not entitled as a matter of due process to have his mistaken understanding of the plea bargain enforced against the prosecutor. See ***United States*** v. ***James***, 532 F.2d 1161, 1162-63 (7th Cir. 1976), cert. denied, 429 U.S. 840, 97 S.Ct. 112, 50 L.Ed.2d 107 (1976).

The prosecutor's alleged knowledge of Carpenter's mistake should not change this result under ***Santobello***. The prosecutor did not induce the alleged mistake in any way. Carpenter's counsel would be the likely person to blame for such a mistake on Carpenter's part, but this Court has recognized that such mistakes do not necessarily vitiate a guilty plea. A defendant in such circumstances must show that there was a reasonable probability that, but for counsel's error, "he would not have pleaded guilty and would have insisted on

going to trial." ***Hill*** v. ***Lockhart***, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, (1985). This requirement shows that the Due Process Clause does not automatically require relief when a defendant pleads guilty under a mistaken expectation. Absent a showing of a reasonable probability that the mistake materially affected Carpenter's decision to plead guilty, it is fundamentally fair to require him to live with the mistake made by him and his counsel, a mistake not caused in any way by the prosecutor. In any event, even if Carpenter had shown a reasonable probability of a material effect, the proper remedy still would have been withdrawal of his plea, rather than the enforcement of a "promise" the prosecutor never made.

In addition to misapplying ***Santobello***, the Ohio Supreme Court ignored the sound reasoning of this Court in ***United States*** v.

Benchimol, 471 U.S. 453, 105 S.Ct. 2103, 85 L.Ed.2d 462 (1985). In ***Benchimol***, the prosecutor had promised in the plea bargain to recommend probation on condition that restitution be made. However, the court of appeals concluded that the prosecutor had breached the plea bargain by making the recommendation unenthusiastically and by not stating the reasons for the recommendation. This Court reversed. This Court noted that Federal Rule of Criminal Procedure 11(e) had established an elaborate framework for plea negotiations. This Court then stated, as follows:

> It may well be that the Government in a particular case might commit itself to "enthusiastically" make a particular recommendation to the court, and it may be that the Government in a particular case might agree to explain to the court the reasons for the Government's making a particular recommendation. But respondent does not contend, nor did the Court of Appeals find, that the Government

> had in fact undertaken to do either of these things here. The Court of Appeals simply held as a matter of law such an undertaking was to be implied from the Government's agreement to recommend a particular sentence. But our view of Rule 11(e) is that it speaks in terms of what the parties in fact agree to, and does not suggest that such implied-in-law terms as were read into this agreement by the Court of Appeals have any place under the Rule.

Id. at 455, 105 S.Ct. at 2105, 85 L.Ed.2d at 466. This Court concluded, "Since Rule 11(e) speaks generally of the plea bargains that the parties make, it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." ***Id.*** at 456, 105 S.Ct. at 2105, 85 L.Ed.2d at 467.

Although ***Benchimol*** was based on Fed. Crim. R. 11(e), its reasoning has even greater merit in the context of a claim under the Due Process Clause. ***Santobello*** states that a prosecutor's promises must be fulfilled.

Santobello therefore focuses on the promises in fact made by the prosecutor. This focus on actual promises leaves no room for a court later to imply a "promise" as a matter of law. The reasoning of ***Benchimol*** should have governed the Ohio Supreme Court in its deliberations under the Due Process Clause.

Respondent Carpenter attempted to argue in the Ohio Supreme Court that ***Benchimol*** actually supported his position. Carpenter argued, "if the state fails to reserve the right to reprosecute the defendant in the event of changed circumstances, the courts cannot imply that such a term was part of the agreement." The Ohio Supreme Court apparently adopted this argument, because it also referred to the prosecutor's "failure to reserve" the right to prosecute Carpenter. In adopting this argument, the Ohio Supreme Court reached a result that was diametrically

opposed to the reasoning of ***Benchimol***.

The State of Ohio agrees that the prosecutor "failed to reserve" the right to prosecute Carpenter if the victim later died. However, this "failure" meant only that the plea bargain was doubly silent on the issue of future charges. The parties had been silent in their plea bargain, and the prosecutor had added his silence by "failing to reserve" the right to prosecute. Silence plus silence still equals silence.

The "failure to reserve" argument adopted by the Ohio Supreme Court ultimately depended on a "promise" implied as a matter of law. Since the parties themselves did not agree to a term barring a future murder charge, that term could have entered the plea bargain only as a matter of law. Only then would the plea bargain contain a positive term barring a future murder charge. Only then would it

have been necessary for the State to counteract that positive term by "reserving" its right to prosecute. The Ohio Supreme Court violated the reasoning of ***Benchimol*** by adopting Carpenter's "failure to reserve" argument.

The Ohio Supreme Court relied on cases from other states that were equally violative of the principles of ***Santobello*** and ***Benchimol***. The Ohio Supreme Court relied heavily on the decision of the New Jersey Supreme Court in ***State*** v. ***Thomas***, 61 N.J. 314, 294 A. 2d 57 (1972). The ***Thomas*** case also involved a scenario in which the victim died after the parties had reached a plea bargain regarding assault charges. Like the Ohio Supreme Court, the ***Thomas*** court purported to base its decision on ***Santobello***. However, the ***Thomas*** court violated ***Santobello*** because it honored what it perceived to be the defendant's

"expectations" that he would not be prosecuted if the victim later died. The ***Thomas*** court enforced those "expectations" against the prosecutor even though those expectations had resulted from the improper advice of the defendant's attorney rather than from any promise or representation made by the prosecutor.

The Connecticut Court of Appeals committed an even more egregious violation of ***Santobello*** in ***State*** v. ***Nelson***, 23 Conn. App. 215, 579 A. 2d 1104 (1990), appeal denied, 216 Conn. 826, 582 A. 2d 205 (1990), cert. denied, 499 U.S. 922, 111 S.Ct. 1315, 113 L.Ed.2d 248 (1991). ***Nelson*** also involved a "victim later dies" scenario. However, there was no indication that the defense attorney had misled the defendant regarding the possibility of future homicide charges. Nevertheless, the ***Nelson*** court determined that the defendant had

held a "reasonable belief" that she would not be prosecuted on future homicide charges. Like the Ohio and New Jersey Supreme Courts, the ***Nelson*** court failed to recognize that a prosecutor is bound only by promises actually made. A prosecutor is not bound by a defendant's mistaken beliefs about the terms of a plea bargain.

The Ohio Supreme Court also cited the decision in ***State*** v. ***Lordan***, 116 N.H. 479, 363 A.2d 201 (1976), but that decision also violated ***Santobello*** and ***Benchimol***. The New Hampshire Supreme Court made no analysis of the actual promises made by the prosecutor. Rather, it determined that the defendant may have held an expectation that he would not be prosecuted on further charges. Of the decisions cited by the Ohio Supreme Court, the ***Lordan*** decision is the least offensive to the principles of ***Santobello*** and ***Benchimol***.

Nevertheless, the ***Lordan*** court failed to recognize that the prosecutor was bound solely by the promises he actually made.

The decision of the Ohio Supreme Court adds to the growing list of cases that have failed to appreciate this "promises actually made" limitation. This Court can rightly fear that other courts will follow these decisions and misapply ***Santobello*** and ignore ***Benchimol***.

This danger of future misapplication of ***Santobello*** is quite real. Even the dissenting justices in the Ohio Supreme Court misapplied ***Santobello***. The dissenters believed that the prosecutor could not make any promises barring a future murder charge. However, under ***Santobello***, if the prosecutor in fact had made such a promise, he would have been bound thereby. Since even the dissenters failed to appreciate this aspect of ***Santobello***, this Court can expect future courts in Ohio and

other states to misapply ***Santobello***.

QUESTION NUMBER TWO

Before a court can specifically enforce a plea bargain against a prosecutor under the Due Process Clause of the Fourteenth Amendment, the defendant must prove by a preponderance of the evidence that the prosecutor breached the bargain.

Even if a prosecutor is bound by more than just the promises he actually made, this case would still present an important issue in the plea bargain context. The Ohio Supreme Court determined that the prosecutor was bound because respondent Carpenter had held a "reasonable expectation" that he would not be prosecuted for murder and because the prosecutor was allegedly aware of this supposed expectation. The State of Ohio disputes whether these factual predicates are sufficient to bind the prosecutor. Nevertheless, even if they are sufficient in

the abstract to bind the prosecutor, respondent Carpenter failed to meet his burden of proving those factual predicates by a preponderance of the evidence. The Ohio Supreme Court failed to recognize Carpenter's burden of proof. This Court could aid the lower courts by addressing the question of the burden of proof.

The Ohio Supreme Court did not address the State's contention that Carpenter failed to meet his burden of proof. The court should have recognized that Carpenter bore the burden of proving the breach of the 1985 plea bargain by a preponderance of the evidence. ***United States*** v. ***Connor***, 930 F.2d 1073, 1076 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 420, 116 L.Ed.2d 440 (1991); ***United States*** v. ***Palomo***, 998 F.2d 253, 256 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 358, 126 L.Ed.2d 322 (1993); ***United States*** v.

Helmandollar (C.A. 9, 1988), 852 F. 2d 498, 502 (burden on moving party to prove existence of plea agreement); ***State*** v. ***Chavez***, 130 Ariz. 438, 439, 636 P.2d 1220, 1221 (1981). If Carpenter's claim was based on the "fact" that he had held a mistaken expectation and the "fact" that the prosecutor knew about the mistake, then Carpenter should have proven those facts by a preponderance of the evidence.

This situation must be distinguished from situations in which the prosecutor is seeking to rescind a plea bargain or is seeking to excuse his nonperformance by claiming a preceding material breach by the defendant. In those situations, the prosecutor bears the burden of proof. See ***United States*** v. ***Verrusio***, 803 F.2d 885, 891 (7th Cir. 1986); ***State*** v. ***Curry***, 49 Ohio App.2d 180, 183-84, 359 N.E.2d 1379, 1381 (1976). The State in

this case never sought to rescind the 1985 plea bargain; no reason existed for the State to seek to rescind a nonexistent term. Furthermore, the State has never claimed that Carpenter breached the plea bargain. Accordingly, contrary to any contention Carpenter may make, the burden of proof never belonged to the State.

In light of Carpenter's burden of proof, the Ohio Supreme Court erred on an Orwellian scale when it granted him relief. There was no evidence that Carpenter actually expected not to be prosecuted for murder. Carpenter never testified about any such expectations. His lawyer at the time of his guilty plea never testified. The only evidence presented by Carpenter were exhibits, and those exhibits did not show in any way that he expected in 1985 not to be prosecuted.

To believe that Carpenter expected not to

be prosecuted, the Ohio Supreme Court had to infer that fact from the general circumstances of the case. However, no such inference could arise from the fact that Carpenter pled guilty to attempted felonious assault while the victim was in an irreversible coma. Not even the New Jersey Supreme Court in ***Thomas*** reached so far. In ***Thomas***, the court at least based its "inference" on a comment by the defendant's lawyer, who had told the defendant he probably could not be prosecuted. Here, Carpenter presented no such evidence.

Under this Court's precedents, the Ohio Supreme Court should have drawn the opposite inference. Carpenter is "strongly presumed" to have received effective assistance from his original trial counsel. ***Strickland*** v. ***Washington***, 466 U.S. 668, 689-90, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 694-95 (1984); ***State*** v. ***Smith***, 17 Ohio St.3d 98, 100, 477

N.E.2d 1128, 1131 (1985). Based on that presumption, the Ohio Supreme Court should have inferred that Carpenter's lawyer acted competently and informed Carpenter of the possibility of a second prosecution if the victim later died. See ***Diaz*** v. ***United States***, 223 U.S. 442, 448-49, 32 S.Ct. 250, 251, 56 L.Ed.2d 500, 503 (1912); ***State*** v. ***Tolbert***, 60 Ohio St.3d 89, 573 N.E.2d 617 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992). Instead, the Ohio Supreme Court assumed that Carpenter's counsel gave the wrong information to Carpenter. This assumption violated the strong presumption of effectiveness.

The Ohio Supreme Court ignored Carpenter's burden of proof in other ways. The court completely ignored the other evidence showing that Carpenter probably knew he could be prosecuted for murder. Two pieces

of evidence stand out. First, Assistant Prosecutor VanDerKarr testified that he expressly refused to make any promise that precluded future prosecution. (Hrg., 2-12-91, at 11-12) Second, when the defense counsel talked at the 1985 plea hearing, he stated that the State's recommendation of a two-to-ten year sentence was "the basis of the bargain in this case." (Hrg., 1-14-85, at 10)

These facts decimate the Ohio Supreme Court's assumptions about Carpenter's "expectations." Assistant Prosecutor VanDerKarr refused to bargain over the future murder charge, and Carpenter's lawyer is presumed to have done his duty and informed Carpenter of that refusal. The defense lawyer's statement at the plea hearing shows that the inducement for Carpenter's guilty plea was the two-to-ten year recommendation, not any other expectation by Carpenter. These

undisputed facts show that defendant probably knew he could be prosecuted for murder. The Ohio Supreme Court's failure to recognize these undisputed facts is a further indication that the court ignored Carpenter's burden of proof.

The Ohio Supreme Court reached even greater Orwellian heights when it stated that the prosecutor was aware of defendant's "expectations." Again, neither Carpenter nor his lawyer testified on that subject. Furthermore, the prosecutor testified that he expressly refused to make any promise in that area. The prosecutor assumed that Carpenter's lawyer would do his duty and inform Carpenter of that refusal to bargain. (Hrg., 2-12-91, at 13-14) The Ohio Supreme Court had no evidentiary basis for its conclusion that the prosecutor was aware. The evidence showed that the prosecutor was unaware of any alleged

expectation on Carpenter's part that he would not to be prosecuted. The Ohio Supreme Court ignored Carpenter's burden of proof.

This Court would aid lower courts by specifying the burden of proof that applies when a defendant seeks specific performance of a plea bargain.

CONCLUSION

This case offers an important opportunity for this Court to clarify ***Santobello***. To the State of Ohio, ***Santobello*** is clear enough: only promises actually made will be enforced against the prosecutor. See also ***United States*** v. ***Benchimol***, ***supra***. However, lower courts continue to misunderstand or overlook that principle. The Ohio Supreme Court misunderstood it in this case. The New Jersey and New Hampshire Supreme Courts overlooked it in ***Thomas*** and ***Lordan***. The Connecticut Court of Appeals failed to recognize it in ***Nelson***. The Fourth Circuit Court of Appeals failed to recognize it in ***Guevara***. Given this continued confusion over ***Santobello***, it would be wise for this Court to expend its scarce judicial resources to review this case and clarify ***Santobello***. In doing so, this Court would prevent future courts from joining the growing

list of courts that have misapplied ***Santobello***. Moreover, this Court would prevent further injustices that would necessitate needless appeals to state appellate courts and needless petitions for certiorari to this Court.

The State of Ohio is aware that this Court has denied petitions for certiorari in the past few years in ***Nelson*** and ***Guevara***. However, the decision of the Ohio Supreme Court shows that the lower courts continue to be confused about the limits of ***Santobello***. This continuing confusion may not have been apparent when this Court denied certiorari in ***Nelson*** and ***Guevara***. The confusion is now quite apparent, and therefore the State of Ohio urges this Court to grant certiorari.

By granting certiorari, this Court also could aid lower courts by setting forth the applicable burden of proof. The Ohio Supreme

Court completely ignored respondent Carpenter's burden of proof. In the process, the court made errors of Orwellian dimension. Plea bargain claims are litigated every day in this Nation, and the lower courts would benefit greatly from having a definite pronouncement on the burden of proof.

The State of Ohio cannot make any claim that future courts will be tempted to follow the Ohio Supreme Court on the burden of proof issue. The Ohio Supreme Court's opinion did not address the issue. Therefore, other courts will likely conclude that the evidence actually supported the court's factual conclusions. See ***People*** v. ***Latham***, 83 N.Y.2d 233, ___ N.E.2d ___ (1994). Nevertheless, this Court would aid the lower courts by addressing the issue, and this Court would correct a grave injustice. In the recent past, this Court has summarily reversed the

Ohio Supreme Court because of that court's misapplication of a well-settled principle of search-and-seizure law. ***Smith*** v. ***Ohio***, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 404 (1990). This case presents an equally egregious misapplication of the law and therefore merits similar treatment.

For the foregoing reasons, the State of Ohio urges that this Court grant a writ of certiorari and thereafter reverse the flawed judgment of the Ohio Supreme Court.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF OHIO,

Petitioner,

-vs-

JEFFREY CARPENTER,

Respondent.

On Petition for A Writ of Certiorari
To the Supreme Court of Ohio

APPENDIX

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APPENDIX A

THE STATE OF OHIO, APPELLEE, V. CARPENTER, APPELLANT.

[Cite as ***State*** v. ***Carpenter*** (1993), 68 Ohio St.3d 59]

The State cannot indict a defendant for murder after the court has accepted a negotiated guilty plea to a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea.

(No. 92-1269 -- Submitted September 15, 1993 -- Decided December 22, 1993)

APPEAL from the Court of Appeals for Franklin County, No. 91AP-1150.

Appellant, Jeffrey Carpenter, was indicted on one count of felonious assault arising from a stabbing which occurred on September 6, 1984. The record indicates that on January 17, 1985, appellant, after plea negotiations with the state, entered a guilty plea to the lesser included offense of

attempted felonious assault. The State agreed to recommend the minimum allowable sentence of two to ten years and a maximum fine of $5,000. At the time the state entered into the agreement, it was aware that the victim was in a coma and would very probably die, allegedly as a result of the defendant's actions. The plea agreement contained no reference to additional prosecution in the event of the alleged victim's death. Defendant was sentenced to a term of two to ten years' imprisonment.

On March 28, 1986, the victim died. The state had actual and timely notice of the victim's death. Sometime after September 1987, appellant was released from prison after serving almost three years of his sentence. On January 28, 1988, shortly after appellant's release, he was indicted for murder of the victim.

The murder indictment was subsequently dismissed by the trial court on two separate occasions: first, on the basis of double jeopardy; and later, on the grounds that defendant was denied due process of law by the state's delay in seeking an indictment for murder. In both instances, the court of appeals reversed. ***State*** v. ***Carpenter*** (Mar. 14, 1989), Franklin App. No. 88AP-860, unreported, 1989 WL 23690; ***State*** v. ***Carpenter*** (June 7, 1990), Franklin App. No. 89AP-1446, unreported, 1990 WL 75436. On remand, appellant filed a third motion to dismiss the indictment asserting that further prosecution was barred by the terms of the 1985 plea agreement. The trial court granted appellant's motion to dismiss and the court of appeals reversed.

This cause is now before this court upon an allowance of a motion for leave to appeal.

Michael Miller, Franklin County Prosecuting Attorney, and *Steven L. Taylor*, Assistant Prosecuting Attorney, for appellee.

Philip Churchill, Franklin County Public Defender, and *John W. Keeling*, Assistant Public Defender, for appellant.

FRANCIS E. SWEENEY, SR., J. The sole issue before this court is: When the state accepts a negotiated plea, and the victim later dies of injuries sustained in the crime, can the defendant later be indicted for murder where the state does not expressly reserve the right of the state to file additional charges, should the victim later die? For the following reasons, we answer "no" and, thereby, reverse the judgment of the court of appeals.

Plea agreements are an essential and necessary part of the administration of justice. ***Santobello*** v. ***New York*** (1971), 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 432. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons." ***Id.*** at 261, 92 S.Ct. at 498, 30 L.Ed.2d at 432. "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." ***Id.*** at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433.

In ***State*** v. ***Thomas*** (1972), 61 N.J. 314, 294 A.2d 57, the New Jersey Supreme Court decided a case closely on point with the present case. In ***Thomas***, the defendant knocked a woman to the sidewalk and took off

with her purse. The defendant was charged with robbery, assault with intent to rob, and atrocious assault and battery. Pursuant to a plea bargain, the defendant pled guilty to the charge of atrocious assault and battery and he was sentenced accordingly. Thereafter, the victim died. About eight months later the two remaining counts were dismissed, and the state secured an indictment for murder.

The New Jersey Supreme Court directed that the indictment be dismissed and held:

"From an examination of the record * * * we are convinced that the defendant anticipated that by pleading guilty to atrocious assault and battery, and then serving whatever sentence might be imposed, he was terminating the incident and could not thereafter be called upon to account further. We think, under all of the circumstances, that this expectation was entirely reasonable and

justified. Furthermore we think it was shared by the prosecutor, at least until he learned that Mrs. Murray had died." 61 N.J. at 323, 294 A.2d at 62.

Several other courts adopting the rationale of ***Thomas*** have held that if the state wants to reserve its right to file additional charges based upon the contingency of the death of the alleged victim, it must make such a contingency part of the plea agreement. See ***State*** v. ***Nelson*** (1990), 23 Conn. App. 215, 579 A.2d 1104; ***State*** v. ***Lordon*** (1976), 116 N.H. 479, 363 A.2d 201.

In the present case, the state had actual knowledge of the alleged victim's condition at the time of the plea agreement and knew death was possible. Nevertheless, the state accepted a plea in which it agreed to reduce the charge of felonious assault to attempted felonious assault and recommend the imposition

of a minimum sentence of two to ten years. By accepting a plea to a lesser included charge, the state obtained a definite prison term for the defendant and avoided the uncertainties of trial. In exchange, the appellant anticipated that by pleading guilty to attempted felonious assault, and giving up rights which may have resulted in his acquittal, he was terminating the incident and could not be called on to account further on any charges regarding this incident. We think this expectation was entirely reasonable and justified and that the prosecutor was aware of this expectation. Therefore, if the state wanted to reserve its right to bring further charges later, should the victim die, the state should have made such a reservation a part of the record.

Accordingly, we hold that the state cannot indict a defendant for murder after the court has accepted a negotiated guilty plea to

a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea.

The judgment of the court of appeals is reversed, the indictment for murder is ordered dismissed and the defendant is discharged.

Judgment reversed, indictment for murder dismissed and defendant discharged.

Moyer, C.J., A.W. Sweeney, Douglas and Wright, JJ., concur.

Resnick and Pfeifer, JJ., dissent.

Pfeifer, J., dissenting. There is no doubt that the prosecution of the case against Carpenter has been less than perfect. Twenty-two months passed between the victim's death and the time Carpenter was indicted for murder. The prosecutor inexcusably claims that the defendant's case "fell through the cracks." Still, a person was killed in this

case, and Carpenter should not go untried for murder simply because he was lucky enough to negotiate a settlement before the victim died of the mortal injuries Carpenter inflicted.

This court has previously refused to accept jurisdiction in this case on Carpenter's claim of double jeopardy. ***State*** v. ***Carpenter*** (1989), 44 Ohio St.3d 709, 542 N.E.2d 347. It is well settled that a defendant may be tried for the murder of his victim even if he had been previously convicted of a lesser related offense prior to the victim's death. "The courts have long held that where a fact necessary to the commission of one offense occurs after the defendant has been convicted of another offense, multiple prosecutions are not barred by the Double Jeopardy Clause." ***State*** v. ***Thomas*** (1980), 61 Ohio St.2d 254, 262, 15 O.O.3d 262, 267, 400 N.E.2d 897, 904.

The same type of reasoning should be applied in the present situation. Where a fact necessary to the commission of one offense has not occurred at the time a plea bargain is made, the plea bargain cannot apply to that offense. A plea bargain applies to the universe of charges that could be associated with one set of facts. At the time of the plea bargain in this case, murder could not have been included in the universe of possible charges. The victim's death had not yet occurred.

Carpenter was going to be tried for something at the time of the plea bargain--the prosecutor did not need to wait until the death of the victim to try him. Since there were no double-jeopardy implications, Carpenter could have been convicted of attempted murder, felonious assault, or some other crime prior to the victim's death, and

again for murder after the victim's death. He would have gone to jail if convicted prior to the victim's death. Prosecutor and defendant weighed the risks associated with possible convictions under the facts as they then existed, and arrived at their plea bargain.

The majority decision clouds the plea bargaining process by adding extraneous factors for consideration. Where do we draw the line.? At what point in the victim's struggle for survival is the prosecutor deemed to know that the victim will probably die, and at what point is that knowledge assumed to be wordlessly understood in the plea agreement?

In cases like this defendants are in a position where they can be convicted of some crime prior to the victim's death. We have no reason to believe that the plea bargain applies to any charge but that one. I believe that it is contrary to sound public policy to

allow prosecutors and defense counsel to make plea bargains on crimes that have not yet been committed, especially when the bargaining is tied to the victim's chances of survival.

I would thus affirm the judgment of the appellate court.

Resnick, J., concurs in the foregoing dissenting opinion.

APPENDIX B

THE SUPREME COURT OF OHIO

1994 TERM

To wit: February 2, 1994

State of Ohio, Case No. 92-1269

Appellee,

v. REHEARING ENTRY

Jeffrey Carpenter, (Franklin County)

Appellant.

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 91AP1150)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellant,

v. No.91AP-1150

Jeffrey Carpenter, (REGULAR CALENDAR)

Defendant-Appellee.

OPINION

Rendered on April 30, 1992

MR. MICHAEL MILLER, Prosecuting Attorney, and MS. JOYCE S. ANDERSON, for appellant.

MR. JAMES KURA, Public Defender, and MR. JOHN KEELING, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

The State of Ohio appeals from a judgment of the Franklin County Court of Common Pleas dismissing a murder indictment lodged against defendant, Jeffrey Carpenter. The trial court held that a negotiated guilty plea to a charge of aggravated assault precludes a subsequent indictment for murder following the victim's death unless the state expressly reserves the right to file additional charges. For the reasons that follow, we hold that such a limitation on the state's right to file additional charges should not be implied from a plea bargain absent some proof of the parties' consent thereto. As there is no proof that the state agreed to the condition imposed by the trial court, we reverse and remand for further proceedings.

Defendant was indicted by the Franklin County Grand Jury in October 1984 on one count of felonious assault. The indictment arose

from a stabbing which took place on September 6, 1984. In a plea bargain, defendant agreed to plead guilty to the lesser included offense of attempted felonious assault. The trial court accepted the plea and sentenced defendant to a term of two to ten years. After serving almost three years of this sentence, defendant was released from prison in November 1987.

While defendant was incarcerated, the victim of his crime died of injuries received in the assault. As a result, defendant was indicted for murder on January 28, 1988. This indictment was subsequently dismissed by the trial court on two separate occasions; first, on the basis of double jeopardy; and later, on the ground that defendant was denied due process of law by the state's delay in seeking an indictment for murder. In both instances, this court reversed. *State v. Carpenter*

(March 14, 1989), Franklin App. No. 88AP-860, unreported (1989 Opinions 573); *State v. Carpenter* (June 7, 1990), Franklin App. No. 89AP-1446, unreported (1990 Opinions 2145). On remand, defendant filed a third motion to dismiss the indictment. In this motion, defendant asserted that further prosecution was barred by the terms of the 1985 plea agreement. At a hearing held on defendant's motion, the prosecutor originally assigned to the case testified that he had expressly declined to make any commitment as to whether defendant would be charged with murder if the victim died. Defendant presented no testimony to the contrary, relying entirely on the terms of the plea agreement already in the record.

On September 13, 1991, the trial court granted defendant's motion and dismissed the indictment for the third time. The trial court found that the plea agreement contained

no reference to the possibility of further prosecution in the event of the victim's death. Nevertheless, the court held that a term prohibiting the state from filing additional charges would be implied as a matter of law absent an express term to the contrary. The court also found that the state had waived its right to rescind the agreement by failing to act within a reasonable time after learning of the victim's death. From this judgment, the state filed this timely appeal, asserting a single assignment of error:

> "The trial court erred in finding that appellee's guilty plea to attempted felonious assault contained an agreement that he would not be prosecuted for murder if the victim later died."

Plea bargaining has become an essential and largely desirable element of our criminal justice system. *Santobello v. New York* (1971), 404 U.S. 257, 261. As the term

implies, the essence of a plea bargain is an agreement between the prosecutor and the defendant. For this reason, the courts have drawn heavily upon the principles of contract law when called upon to construe and enforce negotiated plea agreements. As is the case in the law of contracts, the party seeking to enforce a plea agreement bears the burden of proving its existence. *State v. Thrower* (1989), 62 Ohio App. 3d 359, 376. In this case, there is no dispute as to the terms of the plea agreement by which defendant pled guilty to attempted felonious assault. It simply did not address whether or not the state could file additional charges in the event of the victim's death. As defendant presented no evidence other than the terms of the plea agreement, he has failed to meet his burden of proving that the state agreed to a

limitation on its right to file additional charges.

Unable to find that the state expressly or implicitly consented to the limitation on its right to file additional charges, the trial court implied such a limitation from the plea agreement as a matter of law. For this proposition, the court relied on *State v. Thomas* (1972), 61 N.J. 314, 294 A. 2d 57, a case involving facts similar to the instant case. In *Thomas*, the defendant pled guilty to one count of robbery in return for the dismissal of two other charges. When the victim later died of injuries sustained during the robbery, the defendant was charged with murder. On appeal, the New Jersey Supreme Court held that the murder indictment was barred by the previous plea agreement. Even though the plea agreement did not address the issue and there was no proof that the state

consented to a limitation on further prosecution in the event of the victim's death, the court held that the defendant had a reasonable expectation that the entire incident was terminated by his original guilty plea.

In *Thomas* and other cases adopting a similar approach, the courts have placed the burden on the state to expressly reserve its right to file additional charges, should the victim of an assault or robbery later die of injuries sustained in the crime. See *State v. Nelson* (1990), 23 Conn. App. 215, 579 A. 2d 1104; *State v. Lordon* (1976), 116 N.H. 479, 363 A. 2d 201. Under this rule, contingencies not specifically addressed in the agreement are effectively resolved in favor of the defendant. For the following reasons, we decline to adopt such a rule in this case.

Instead, we prefer the approach taken by the United States Supreme Court in *United States v. Benchimol* (1985), 471 U.S. 453. In that case, the Court of Appeals held that when the government agrees in a plea bargain to make a particular recommendation to the court, it must do so "enthusiastically," explaining the reasons for its recommendation. Although the government had not agreed to make an "enthusiastic" recommendation, the Court of Appeals held that such a duty should be implied from the agreement. On appeal, the United States Supreme Court reversed. Observing that Fed. Crim. R. 11(e) sets out an elaborate formula for the negotiation of plea bargains, the court held that "*** it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." Id. at 456.

Of the two cases, we think *Benchimol* states the better rule. In Ohio, Crim. R. 11(F) governs the use of negotiated pleas in felony cases. The rule provides that "*** the underlying agreement upon which the plea is based shall be stated on the record in open court." The rule puts all parties on notice that they should rely only on agreements which are stated on the record, not on terms which are merely implied from the bargain. There is no requirement that a plea bargain address every possible contingency. Where an agreement does not address a contingency, the court should not supply the missing term where the parties have not don so. In contract law, the parties' intent is presumed to reside in the language employed in the agreement. *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus. A court should not read into the agreement terms

or language which the parties chose not to include. *Herder v. Herder* (1972), 32 Ohio App. 2d 75, 76. When a plea agreement does not address given contingency, the court should generally presume that it was the parties' intent that they would retain whatever rights they had prior to the agreement.

A term upon which the parties have not agreed may be implied as a matter of law where clearly necessary to prevent manifest injustice. Here, there is no injustice which would warrant the limitation implied by the trial court. When defendant pled guilty to the charge of aggravated assault in 1985, it was well-established that double jeopardy would not preclude a subsequent charge for murder in the event of the victim's death. *State v. Thomas* (1980), 61 Ohio St. 2d 254, paragraph six of the syllabus. Under these

circumstances, it is simply unreasonable to assume that a plea to an aggravated assault charge would preclude a murder charge if the victim later dies of injuries received in the assault.

As there was no proof that the state consented to a limitation on its right to file additional charges, the trial court erred when it held that the murder indictment was barred by the 1985 plea agreement. Given this holding, we need not reach the second issue addressed by the trial court -- whether the state waived its right to rescind the original plea agreement. Because the plea bargain did not preclude further prosecution, there is no cause to rescind the original plea agreement. As this court discussed in the first appeal of this matter, defendant's conviction on the assault charge will merge with the murder charge after the fact, should defendant be

convicted on the charges set forth in the indictment.

The state's assignment of error is sustained and the judgment of the trial court is reversed. On remand, the court is directed to reinstate the murder indictment and set this matter for trial.

Judgment reversed; cause remanded.

BRYANT and STRAUSBAUGH, JJ., concur.

STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF FRANKLIN
COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO, (filed September 13, 1991)

Plaintiff,

vs. Case No. 88CR-01-286
Judge Reda

JEFFREY CARPENTER,

Defendant.

DECISION AND JUDGMENT ENTRY

OF DISMISSAL

This matter comes before the court on the defendant's motion to dismiss on the grounds that the prosecution of the defendant is barred by the previous plea agreement entered into by the state and the defendant.

The defendant was initially charged with felonious assault in another case based upon the same conduct as in the instant murder prosecution. Records from the other case

(Case No. 84CR-09-2646) were introduced into evidence in this case. The records indicated that on January 14, 1985, the defendant, after plea negotiations with the state, entered a guilty plea to a stipulated lesser offense of attempted felonious assault and received the minimum allowable sentence of two to ten years. The defendant received jail time credit of 131 days indicating that he had been in pretrial confinement since the date of the alleged offense. (See judgment entry and guilty plea forms, Defendant's Exhibits C and D.)

On March 28, 1986, the alleged victim, Mark Walden, died. The state had actual and timely notice of Walden's death. (Coroner's report, Defendant's Exhibit F). On November 23, 1987, the defendant was released from prison after serving three years, two months, and seventeen days. On January 28, 1988,

shortly after the defendant's release, the state obtained the instant murder indictment against the defendant. During the interim period, the record does not indicate that the state made any effort to void or vacate the original plea agreement entered into by the state and the defendant.

During the course of the proceedings herein, the court has heard evidence and inspected exhibits relevant to the issues at hand. The court makes the following findings of fact:

> 1. The state entered into a previous plea agreement with the defendant. At the time the state entered into the previous agreement, it was aware of the probability a possibility that the alleged victim might die. (See February 12, 1991, transcript page 12.) The state, nevertheless, consummated a plea agreement with the defendant that contained no reference to further or additional prosecution in the event of the alleged victim's death.

2. The state had actual and timely notice of the decedent's death on March 28, 1986.

3. The state took no action to revoke or vacate its previous plea agreement. In fact, the state took no action with respect to this matter until after the defendant was released from imprisonment when it then sought the instant indictment on January 28, 1988. The state has, of this date, still failed to file any motion to revoke or vacate its previous plea agreement. The state has further failed to offer any justification for the delay of almost two years between the death of the decedent and the indictment of the defendant.

4. Due to the lack of any explanation by the state and the fact that the state waited to obtain the instant indictment until after the defendant had served his term of imprisonment imposed as a result of the plea bargain entered into between the defendant and the state, the court finds that the state, by its delay, sought to take full advantage of its plea bargain to the detriment of the defendant. The court further finds that by its own inaction and delay, the state has ratified its previous agreement with the defendant and has waived its right to further prosecute the defendant.

A. The Previous Plea Agreement Entered Into by the Defendant and the State Bars Further Prosecution.

Plea agreements are very similar to settlement agreements in civil cases. Parties enter into them for the advantages that are obtained and the risks that are avoided. Plea agreements are just as binding between the parties and such agreements are clearly enforceable with respect to the terms of the agreement. In *Santobello v New York* (1971), 404 U.S. 757, 92 S. Ct. 495 the Supreme Court stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. [Id.260]
>
> * * *
>
> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. [Id.261]
>
> * * *

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. [Id.262]

Courts draw a parallel between plea bargains and the law of contracts. In *Cooper v. United States* (4th Cir., 1979), 594 F. 2d 12, 15-16 the court stated:

> Both before and since *Santobello*, the courts have understandably drawn heavily on the ready analogies of substantive and remedial contract law to supply the body of doctrine necessary to order plea bargaining practices and to afford relief to defendants aggrieved in the negotiating process. To the extent therefore that there was evolved any general body of "plea bargain law," it is heavily freighted with these contract law analogies. When *Santobello* made it plain, however, that the core concept here is the existence of a constitutional right

> in the defendant to be treated with "fairness" throughout the process, this presaged inevitably the question of the extent to which contract law may be drawn upon to define the limits of this constitutional right. That is the precise issue presented in this case, where we are asked to find and enforce a right probably lying beyond any provided by contract law analogy. [footnote omitted]

The Supreme Court in *Blacklege v Allison* (1977), 431 U.S. 63, 75 N. 6, 97 S. Ct. 1621, 1630, n. 6, also expressly analogize the law of enforcing plea agreements to that "found in the law of contracts."

Thus the values that underlie contract law may be used to enforce plea agreements in addition to the added rights guaranteed by the Due Process Clause that presupposes fairness in the conduct of the government and that a constant factor of such fairness is that the promise of the prosecutor must be fulfilled. *Santobello v. New York, supra.*

Had a provision been inserted into the plea agreement indicating that the defendant would not be further prosecuted even if the alleged victim subsequently died, it would be clear that the state could not thereafter violate its promise and prosecute the defendant. Likewise, if the state had expressly reserved the right to further prosecute the defendant if the alleged victim died, the agreement itself would not constitute a bar to further prosecution.

In the instant situation, however, the prior plea form does not address the issue at all. (Plea form, Defendant's Exhibit D) Under such circumstances, the law has held that the state, unless it has specifically reserved the right to further prosecute the defendant, is bound by its promises made to the defendant.

This result was obtained by the Supreme Court of New Jersey in *State v Thomas* (N.J. 1972), 294 A. 2d 57, in a case very much on point. The Court dealt with a situation in which the defendant, charged with robbery, assault, and atrocious battery, had entered a guilty plea to the charge of atrocious battery and the other two counts were dismissed.

Thereafter the victim died and a murder indictment was obtained after the defendant had been paroled after serving 18 months in prison. The court held that given the chronology of events, double jeopardy did not bar prosecution since the death of the victim occurred after the defendant's conviction. However, the court did find that the previous plea agreement did constitute an additional factor for consideration.

The facts indicated that at the time of the guilty plea the defendant knew the victim

was likely to die but the prosecutor did not. The court stated that "[i]n our view it has been clearly established that defendant entered into what we find to have been a perfectly valid plea bargain, to the full benefits of which he remains entitled." [Id. 60]

The court further concluded that the prosecutor's ignorance of the victim's condition was no excuse since such information was readily available and should have been known to the prosecutor. The failure of defense counsel to disclose the victim's condition was not improper since defense counsel has no duty to alert the state to imminent pitfalls or of possible missteps. The court held that fundamental fairness required enforcing the plea bargain because the defendant played no role in the prosecutor's incomplete evaluation of the

wisdom of the original agreement. The court noted the importance and purpose of plea bargaining and stated that if "plea bargaining is to fulfill its intended purpose, it must be concluded fairly on both sides and the results must not disappoint the reasonable expectations of either." [Id.61]

The court then held:

> Where there has been a failure on the part of the prosecution to abide by the terms of a plea bargain, the remedial step will normally be either to vacate the guilty plea and permit the defendant to plead anew, or to direct that such steps be taken as may be necessary to carry out the terms of the agreement. To vacate the plea in this case would be unjust to the defendant who has already been punished for the crime to which he confessed. As to him the status quo cannot be resumed. On the other hand, he has performed his part of the bargain. The terms of the agreement will have been fully carried out on both sides if the murder charge is now dropped. [Id.62]

State v Thomas, supra, is factually identical to the case at bar except in the

instant case the state had actual knowledge of the alleged victim's condition at the time of the plea agreement and knew that death was possible. Thus it can be readily determined that the previous plea agreement is still binding upon the parties.

The analogy to contract law is apparent. A party to a contract cannot void a contract merely because of disillusionment created by subsequent events or circumstances. Following plea agreements it is not at all unusual for defendants to become disenchanted with the agreement or the subsequent sentence but they are nevertheless bound by their pleas. Likewise the state is bound by its agreement even though unexpected events occur unless special contingencies are made a part of the plea agreement reflecting a manifest of the mutual assent of the parties not to be bound if such contingencies occur.

Just as parties in a civil personal injury case can enter into settlement agreements with expectations of finality, so too can the parties in a criminal case. A defendant who enters into an agreement with the government that limits the extent of his prosecution is protected in the same fashion as the civil litigant from subsequent claims that changed circumstances void the agreement. If the state wants to reserve the power to void or vacate its agreement based upon the contingency of the death of the alleged victim, it must make such a contingency part of the agreement in the same fashion that civil litigants must make such reservations.

B. The State's Delay in Prosecuting the Defendant Constituted a Ratification of the Prior Plea Agreement and a Waiver of Its Right to Further Prosecute the Defendant.

Even if it is assumed, arguendo, that the state had the right to void or vacate its prior plea agreement following the death of the decedent, the state must make such an election promptly. Implicit in all plea negotiations and in criminal prosecutions in general is the finality of the process. The criminal defendant has a reasonable and justifiable expectation that a conviction constitutes a termination of the matter upon which the prosecution was based. This expectation is well-founded upon the principles of double jeopardy, speedy trial, and due process that generally serve to prohibit multiple prosecutions arising from the same offense. See *Brown v. Ohio* (1977), 432 U.S. 161, 97 S. Ct. 2221 (The Supreme Court held that double jeopardy guarantees protect against multiple prosecution as well as multiple punishments and that such a

guarantee serves as a constitutional policy of finality for the defendant's benefit. Thus it held that a person convicted of joyriding could not thereafter be prosecuted for auto theft.)

The principle that bars successive prosecutions based upon factual issues already resolved by prior litigation is well-grounded upon fundamental tenants of fairness. In the instant situation, had the decedent not died, it is clear that the state, after securing the defendant's conviction through a plea agreement, could not later prosecute the defendant on other charges based upon the same conduct unless such reservation was made apart of the agreement. Thus the state could not fairly and properly obtain the defendant's conviction by allowing him to plead to a reduced charge of attempted felonious assault and thereafter prosecute him for attempted

murder based upon the same alleged conduct. The state, by making its offer and inducing the defendant to plead guilty made a proper election of its remedies and by so doing waived its right to prosecute the defendant on other charges based upon the same conduct.

It is also apparent, that had Walden died before the state entered its plea agreement with the defendant, the state would be bound by its agreement and could not subsequently prosecute the defendant for murder. The state having knowledge of the death of Walden prior to entering the plea agreement would likewise be deemed to have made a proper election and to have waived its right to prosecute the defendant for murder by allowing him to plead to a lesser offense.

If the state does indeed have the power to vacate or void a prior plea agreement with the defendant after the subsequent death of

the alleged victim, such an election must be made promptly. The failure to promptly act to prosecute the defendant would be deemed a ratification of the plea agreement and a waiver of further prosecution. The state cannot sit back, take full advantage of its "bargain", and then later be heard to say that it does not wish to be bound thereby.

Again, an analogy to contract law is helpful. The right to rescind a contract may be lost where there is ratification or waiver. A delay in asserting a right to rescind can constitute a waiver. In any event, a party to a contract who, after discovery or knowledge of facts which would entitle him to rescind, treats the contract as a subsisting obligation and leads the other party to believe that the contract is still in effect waives his right to rescind. Furthermore, a waiver will be found if a party continues to accept benefits

growing out of the contract. Even an assertion of rescission is nullified by the subsequent acceptable of contractual benefits.

The state had full knowledge of the decedent's death. Instead of acting conscientiously and expeditiously to rescind its agreement and to prosecute the defendant on the charge of murder, it chose instead to sit back for almost two years so that it could defendant who remained imprisoned as a result of his plea bargain in which he gave up fundamental, constitutional rights in exchange for the advantages secured by the agreement. Since the state elected to take advantage of the benefits secured by the previous plea bargain it cannot now attempt to prosecute the defendant for murder since the state, through its delay, has ratified the prior agreement and waived its right to further prosecute the defendant.

Furthermore, the state, as of this date, has failed to file any motion to vacate or void its prior plea agreement with the defendant. Both the prior agreement and the conviction would serve to bar further prosecution of the defendant until the state complies with the procedural requirements that are necessary to void or vacate both the agreement and the conviction. Since both the agreement and the conviction are still valid, they serve as a bar to further prosecutor until such time as the state raises aa proper challenge to them and it is declared that the conviction and the agreement are no longer valid.

IT IS THEREFORE ORDERED that this case is dismissed and the defendant is discharged.

/s/ Reda
JUDGE REDA